AFFIN BANK BHD

v.

WAN ABDUL RAHMAN WAN IBRAHIM

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
RICHARD MALANJUM JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: W-02-300-2001]
13 JANUARY 2003

CIVIL PROCEDURE: *Execution - Leave to issue execution more than six years after judgment - Sufficient grounds for grant of leave – Whether furnished - Application made within 12 years under s. 6(3) Limitation Act 1953 - Negligence of solicitors to initiate action - Whether sufficient grounds - Whether also applicant to blame for delay*

The appellant as the plaintiff in the court below applied pursuant to O. 46 r. 2(1) of the Rules of the High Court 1980 ('RHC') for leave to commence execution proceedings against the defendant after six years had lapsed from the date of judgment. The application was dismissed by the trial judge on the basis that the appellant failed to furnish cogent and acceptable reasons for the grant of leave. The appellant now appealed to this court. The issue was whether the appellant furnished sufficient grounds for granting leave based on the following: (1) that the application was made within 12 years under s. 6(3) of the Limitation Act 1953; and (2) that the appellant's former solicitors neglected to initiate the necessary action.

Held:
Per Arifin Zakaria JCA

[1] The fact that the application was made within the 12-year period as prescribed by s. 6(3) of the Limitation Act 1953 was not sufficient ground for granting leave as the right to sue on a judgment is distinct from the right to issue execution. The appellant had submitted that no injustice or prejudice would be caused to the respondent if leave was granted to the appellant and the trial judge had considered this contention. From the supporting affidavit, the only reason put forth by the appellant was the neglect of its former solicitors to initiate the necessary action. The appellant, however, was not free from blame. It took more than two years to appoint the new solicitors after it failed to hear from its former solicitors. It

followed therefore that the appellant failed to furnish sufficient reasons for the grant of leave. The trial judge had properly exercised his discretion and there was no reason for this court to interfere with his discretion. (pp 829 d-h & 830 a-e)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu sebagai plaintif di mahkamah di bawah memohon melalui A. 46 k. 2(1) Kaedah-kaedah Mahkamah Tinggi 1980 untuk kebenaran memulakan prosiding pelaksanaan terhadap defendan selepas enam tahun telah luput daripada tarikh penghakiman. Permohonan tersebut telah ditolak oleh hakim perbicaraan atas alasan perayu gagal memberi sebab-sebab yang munasabah dan meyakinkan untuk pemberian kebenaran. Perayu telah membuat rayuan ke mahkamah ini. Isu yang berbangkit adalah sama ada perayu telah memberi alasan-alasan yang mencukupi untuk pemberian kebenaran berpandukan kepada hal-hal berikut: (1) permohonan tersebut dibuat dalam tempoh 12 tahun di bawah s. 6(3) Akta Had Masa 1953 ('AHM'); dan (2) pengabaian peguam terdahulu perayu dalam memulakan tindakan sewajarnya.

Diputuskan:
Oleh Arifin Zakaria HMR

[1] Fakta bahawa permohonan ini telah dibuat dalam tempoh 12 tahun seperti yang diperuntukkan oleh s. 6(3) AHM tidak merupakan alasan yang cukup untuk memberi kebenaran oleh kerana hak untuk menyaman atas suatu penghakiman adalah berbeza daripada hak untuk mengeluarkan pelaksanaan. Perayu telah menghujah bahawa tiada ketidakadilan atau prejudis akan berlaku terhadap responden jika kebenaran diberi kepada perayu dan hakim perbicaraan telahpun menimbangkan hujah ini. Daripada afidavit sokongan, didapati bahawa satu-satu alasan yang diutarakan oleh perayu adalah pengabaian peguam terdahulunya untuk memulakan tindakan yang perlu. Perayu, walau bagaimanapun, tidak bebas dari kesalahan. Ia mengambil lebih daripada dua tahun untuk melantik peguam baru selepas ia gagal berhubung dengan peguam terdahulunya. Dengan itu, perayu gagal memberi alasan yang mencukupi untuk pemberian kebenaran. Hakim perbicaraan telah menggunakan budibicaranya dengan betul dan tidak terdapat apa-apa sebab untuk mahkamah ini bercampurtangan dalam budibicaranya.

Rayuan ditolak.]

Case(s) referred to:
Public Bank Bhd v. Seato Trading (M) Sdn Bhd & Ors [1996] 1 MLJ 165 HC ***(refd)***
Tio Chee Hing v. chung Khiaw Bank Ltd [1981] 1 MLJ 227 FC ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6(3)
Rules of the High Court 1980, O. 46 rr. 2(1)(a), 3

For the appellant - Karen Wilfred; M/s Rashid & Lee

[Appeal from High Court, Kuala Lumpur; Suit No: 2(S7)-24-633-1987]

Reported by Usha Thiagarajah

JUDGMENT

Arifin Zakaria JCA:

This is an appeal against decision of the learned judge in refusing the appellant's (plaintiff) application for an order that the appellant be allowed to commence execution proceedings against the respondent (defendant) pursuant to an order of court dated 21 January 1988 although six years had lapsed since the making of the order. The application was pursuant to O. 46 r. 2(1)(a) of the Rules of the High Court 1980.

When this appeal came up for hearing the respondent was absent but we proceeded to hear the appeal in the absence of the respondent. Having heard submission of counsel for the appellant we dismissed the appeal. Now we give our reasons for our decision.

The relevant facts as disclosed by the affidavit filed in support of the appellant's application are briefly as follows. The appellant had on 21 January 1988 obtained a judgment in default of appearance against the respondent wherein the respondent was, *inter alia*, ordered to pay the sum of RM47,579.96 together with interest at the rate of 10% p.a. from 13 July 1986 to the date of full and final realisation. Thereafter a bankruptcy notice was filed on 27 August 1993 against the respondent by the former solicitors for the appellant, which was served on the respondent by substituted service. The appellant's solicitors then filed an application to amend the bankruptcy notice and the application for leave to file the creditor's petition. Following which the creditor's petition together with the affidavit of truth of statement were filed. The creditor's petition was fixed for hearing on 24 July 1996. On that date the then counsel for the appellant was absent and the court then struck off the creditor's petition. Some time in 1998 the appellant retained the present solicitors and this application was filed on 27 August 1999 by the present solicitors.

The learned judge in dismissing the appellant's application gave the following reasons:

> Whilst the plaintiff has indeed filed an application for leave within the 12-year expiry period as provided under s. 6(3) of the Limitation Act 1953, and read together with O. 46 r. 2(1)(a) of the RHC, yet the leave asked for can only be given based on reasonably acceptable grounds. In this case, the plaintiff has totally failed to explain why it did not execute within the 6 years provided under O. 45 r. 2(1)(a), other than implying that its previous solicitors had failed to act. The negligence, if any, of the plaintiff's solicitors is no reason why the defendant ought to suffer, by paying excessive interests for all these years. Yet again the plaintiff has failed to give any reason as to why it failed to act immediately after the expiry of the first 6 years and up to the date of filing this application. To my mind the plaintiff ought to have given very cogent and acceptable reasons to enable this court to exercise its discretion in its favour to grant the leave.

It is trite that the grant of leave under O. 46 r. 2 is in the court's discretion. Order 46 r. 3 states that an application under O. 46 r. 2(1) must be supported by an affidavit stating, when the case falls within r. 2(1)(a), the reasons for the delay in enforcing the judgment or order. Therefore, it is incumbent upon the applicant to furnish the court with sufficient reason in support of such an application. What is sufficient reason? This naturally will vary from case to case. It is not possible for this court to provide an exhaustive list of what is considered to be sufficient reason. By way of illustration, in *Tio Chee Hing v. Chung Khiaw Bank Ltd* [1981] 1 MLJ 227 the reasons given for the delay was that there were negotiations for settlement by arrangement. The High Court there accepted that as being sufficient reason and the Federal Court agreed with the trial judge. In *Public Bank Bhd v. Seato Trading (M) Sdn Bhd & Ors* [1996] 1 MLJ 165 Zakaria Yatim J (as he then was) stated that:

> it was proper for the plaintiff not to issue execution when the third defendant was making payments.

However, the fact that the application was made within the 12-year period as prescribed by s. 6(3) of the Limitation Act 1953 for the bringing of an action upon a judgment is not a sufficient ground for granting of leave as the right to sue on a judgment is distinct from the right to issue execution.

In the present case learned counsel for the appellant submitted that no injustice or prejudice would be caused to the respondent if leave is granted to the appellant.

The learned judge had in his judgment considered this contention by the appellant. At p. 4 of his judgment he stated:

> The calculation of the interest as worked out by the plaintiff in the affidavit was as at 12 July 1992 making a total sum due amounting to RM74,134.09. I then asked Ms Karen Wilfred for the plaintiff whether plaintiff had given any explanation as to why it had not proceeded to enforce, as of 1992. Since no explanation was stated in the affidavit no doubt counsel could not give any explanation from the Bar.

We agree with the learned judge that in an application under O. 46 r. 2 it is incumbent for the applicant to furnish sufficient reason to explain for their inaction. From the supporting affidavit the only reason put forth by the appellant in support of this application is the neglect of its former solicitors to initiate the necessary action. But again the appellant is also not free from blame. From the affidavit in support it would appear that the appellant took more than two years to appoint the new solicitors after appellant failed to hear from its former solicitors. Having considered the matter we fully agree with the learned judge that the appellant failed to furnish sufficient reason to persuade the court to exercise the discretion in its favour.

For the above reasons we hold that the learned trial judge had properly exercised his discretion and we find there is no reason for this court to interfere with his discretion. The appeal is therefore dismissed and as the respondent was absent we made no order as to costs.